Case No._____

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

GARY A LEDFORD.,

Petitioner/Appellant,

v.

Energy Resources Conservation Development Commission

Respondent

After a Decision by the Energy Resources Conservation and Development Commission

Case Docket No. 97-AFC-1

DIRECT WRIT OF REVIEW

REQUEST FOR PEREMPTORY WRIT OF MANDATE TO STAY PROCEEDINGS

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Intervenor - Taxpayer and Party in Interest
Within the Mojave Water Agency Boundaries

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List of Abreviations

AFY - Acre-Feet of water per year
CCR - California Code of Regulation
CRWQCBLR - California Regional Water Quality Control Board Lahonton Region
CEQA - California Environmental Quality Act
DECISION - Final Decision in HDPP
GAFB - George Air Force Base
HDPP - High Desert Power Project (97 AFC 2)
MWA - Mojave Water Agency
MRB - Mojave River Basin[s]
PRC - Public Resources Code
PUC - Public Utilities Commission
RWMP - Mojave Water Agency Regional Water Management Plan
SWP - State Water Project
SWRCB - State Water Resources Control Board
VVEDA - Victor Valley Economic Development Authority
VVWD - Victor Valley Water District

Exhibit "A" ORDER DENYING PETITION FOR RECONSIDERATION

I. ISSUES PRESENTED

The conservation of California's "fresh inland water" is mandated by our State's Constitution, its Water Codes and the State Water Board's Resolution[s]. This Petition raises "statewide" water issues. The first issue concerns a citizen's right to equal protection under the California Constitution Article 1 Section 7 (also the United States Constitution). More specifically, as proposed, the High Desert Power Project (HDPP) will receive twice the amount of water at a reduced rate than all other producers in the Mojave River Basin[s] (MRB)[1]. The next issue asks the Court to apply Article X Section 2 of the California Constitution and determine if the project's 100% consumptive use of water is prohibited?

Can the Commission as lead agency under CEQA depart from the rules all other agencies of the state follow when approving projects? Lacking a "will serve letter" from Victor Valley Water District [VVWD] to provide a continuous and un-interruptible source of water, there is no basis to establish reliability or to enable environmental analysis. The project's water facilities are actually intended to serve the redevelopment of George Air Force Base [GAFB] with its cumulative and growth inducing impacts that have not been studied.

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[1] City of Barstow, et. al. v. City of Adelanto - Supreme Court Case Docket No. S07172, on review from Court of Appeal Case Nos. E017881/E018923/E018023 and E018681 and Superior Court No. 208568. Petitioner requests that the Court take judicial notice of this court record pursuant to Evidence Code sections 452 and 459.

Petitioner requests this court act to stay further development of HDPP until the issues raised by this Writ are resolved and decided.

The Issues Presented are discussed in greater detail as follows:

1. Whether the general population of the State of California can be held to a higher standard for water "use" than new merchant power plants without violating the Constitutional mandate of equal protection under Article 1 section 7, and;

2. The California Constitution Article X Section 2, states; "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, . .", Does the Commission carry out its mandate under [PRC § 25531] or fulfill CEQA without Findings that 100% consumptive "use"of "fresh inland water" for power plant cooling is not (1) a "waste" and unreasonable "use" of water? (2) a "beneficial use" of water? (3) a "reasonable method of use" of water? (4) an amount of water "minimally essential"?

3. Whether the Commission as lead agency is mandated by CEQA (PRC §21000 et seq. and the Warren-Alquist Act §25000, et seq.), to provide a "Functional Equivalent Document" to the traditional EIR that: (a) studied the effects of "growth inducing impacts"? (b) studied the effects of "cumulative impacts? (c) assures mitigation beyond asserting general plan conformity; (d) local planning documents are not studied unless the proposed project is discussed;

and (e) adequately responded to public comments.

4. Can the Commision ignore PRC § 21080 requiring "an activity will not be approved or adopted . . .if there are feasible alternatives. . ."

5. Whether the Commission is required to comply with the Water Code[s] Section[s] 100 et.al. that mandates the "waste or unreasonable use or unreasonable method of use of water be prevented."

6. Whether the Commission is required to comply with the Warren Alquist Act and the State Water Resources Control Board Resolution 75-58 (SWRCBR 75-58) to provide "studies" on the use of alternative sources of water to be used in cooling towers, such as the acquisition of legal water rights, the use of waste water or contaminated ground water immediately under the project site; or that "alternative methods of cooling" be implemented, such as dry cooling.

7. Whether the Commission is required to condition the HDPP certification on compliance with the terms of the Judgement after trial currently pending review of this court[2]. Under the Judgment each and every water producer is supposed to be treated "equitably" under the Physical Solution which requires all the producers to purchase "replacement water" and or "make-up water" on the basis of 50% average consumptive use, (Ibid. FN 1) in order

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[2] Ibid. FN 1

to provide return flows to the basin to cure the overdraft. These equities are mandated by the Findings in the Judgment (Ibid. FN1) that the "overdrafting" of a water basin was a waste and unreasonable use of water by all producers, and highlighted in the Fourth Circuit; "Equity dictates that all persons in the same position be treated alike. (Civ. Code, § 3511 [“Where the reason is the same, the rule should be the same.”])”.[3]

8. Does the Certification of a power plant using water for evaporative cooling, for which there is a reasonable alternative, without a dedicated source of water for the full 50 year life of the project violate the Warren Alquist Act, for the Commission to certify power plants that are reliable.

II. WHY REVIEW SHOULD BE GRANTED

The Supreme Court is presently reviewing a court ordered "physical solution" in the MRB, which adjudicates the natural water rights and provides for curing the overdraft. (Ibid. FN 1) Tied together by a common subject, the Court is the last and only Court to hear these statewide issues. Decisions of the Commission can be appealed to the Supreme Court and are governed by the Public Utilities Code (PUC).[4]

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[3] Ibid. FN 1 - Opinion of Fourth Circuit in re MWA v. Barstow et.al. at Page 60.

[4] PRC § 25531. "(a) The decisions of the commission . . .of any electric utility for certification of a site and related facility are subject to judicial review in the same manner as the decisions of the Public Utilities Commission . . . for the same site and related facility".

Petitioner has participated in the public process of siting a power plant in the newly deregulated energy market in California. Petitioner Intervened as required by the Commission and has exhausted his administrative remedies. The process is one where the Commission acts as a traditional Planning Commission, City Council, Superior Court and Appellate Court all rolled into one. The state- mandated requirements under CEQA are conducted, supervised and administered by the Commission and its staff.

The Commission has but one purpose in the siting process and that is to approve power plants.

A. The Commission has a duty to conserve water in compliance with the MWA Regional Water Management Plan and did not

This important case is founded in the principal that all Californian's have a mandated responsibility to comply with the State's Constitution. Article X Section 2 is self-operative. The Commission's own title to be in existence "Resources Conservation" and PRC §25602 compel conservation. The Commission instead has taken the position that it does not have a Constitutional obligation to protect California's Water Resources. Further the Commission has failed, under the Commission's authority, to restrict the water "use", to the "use" of water that is minimally essential for the project approved. Dr. Phyllis Fox provided uncontroverted evidence in her "Well Interference Study", that the MRB was 69,770 acre feet per year in over-

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PUC § 1756. "(a) Within . . . 30 days after the commission issues its decision on rehearing, . . . any aggrieved party may petition for a

draft and projected to increase to 92,780 acre feet by 2015. She finds; "The assertion [that there is an adequate water supply] appears to ignore MWA's requirement to comply with the adjudication."[5]

B. Commission selectively ignored the law in reaching a conclusion of water v. reliability

The Commission takes the position that it does not have an obligation under any law to insure that 100% consumptive "use of water" in cooling towers, is determined to be "reasonable and beneficial" considering the circumstances of a water basin that is over 1,900,000 acre-feet in overdraft[6]. The Lahontan Regional (Basin Plan) identified 22 potential uses for surface water, and six for ground water, which are offered as definitions of "beneficial uses." [7] None include a definition for evaporative cooling for power plants.

Since the project's water supply plan relies on several non-existent documents it would be difficult, in fact impossible, for the Commission to insure this project is "reliable[8]". To issue a certificate to a project without a

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writ of review in the court of appeal or the Supreme Court . . ."

5 DECISION: Ex. 120 page 12; ". . .it is a virtual certainty that future use of MRB reserve would substantially . . . exceed the MWA's current entitlement rights of 75,800 AFY".

6 DECISION: - page 230 -Finding 3. "The Mojave Ground Water Basin is severely overdrafted" also Ex. 111 pg. 1 par 3.

7 DECISION: Ex.126: Lahontan Regional Basin Plan

8 DECISION - Finding of Fact Number 8 on Reliability page 77: "A reliable supply of water is necessary in order to allow the High Desert Power Project to operate reliably".

reliable supply of water clearly violates the Warren Alquist mandate to provide reliable power supplies. Furthermore, it would be unlawful to rely on "proposed agreements" which in and of themselves require CEQA compliance.

The Water Code[9], CEQA, the Warren Alquist Act, the Public Resources Code, State Water Resources Control Board Policy 75-58 and substantial judicial decisions do not support the Commission's Findings and Conclusions as they relate to the project's use of water. [10]

The Commission's jurisdiction includes thermal power plants over 50 megawatts and accompanying linear facilities. Yet in HDPP the Commission takes the position that it can "site" the project without "studying" the cumulative environmental impacts associated with "appurtenant facilities".[11] The Commission's position, without doubt, is preposterous.

The Warren Alquist Act, developed in a "regulated" energy market

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[9] Water Code §§'s 100; § 275."; § 520; § 521 state[s]; ". . . or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, . . [T]he Legislature hereby finds and declares . . .water in this state to beneficial use to the fullest extent of which they are capable, and to prevent waste, unreasonable use, or unreasonable method of use; . . .[T]he Legislature further finds. . . this waste and unreasonable use should be identified, isolated, and eliminated. "

[10] DECISION page 223: "The Committee rejected the contention in declaring the "project" for purposes of our review is the power plant and it's appurtenant facilities"

[11] DECISION page 223: "We realize that our conditions do not resolve the broader water management issues within the region as articulated by Mr. Ledford"

was designed to be "better" than CEQA,[12] to meet and or exceed the requirements of CEQA and only in the rarest of circumstances to interfere with local laws or ordinances. In this case the Commission has not conformed to the law, as acknowledged by Commissioner Moore: "I think Mr. Ledford is raising yet another point . . . that the process that we use is the moral equivalent of CEQA. And, in fact, it's not. It's just not. And he's raising the point again – and you can say ours is better or worse. I'm not making that qualifier, but it's not CEQA. It's not. And so if the desirable outcome is to have a surrogate or proxy for CEQA, this isn't [going to] do it and he's making that point" (RT 05/03/2000 page(s) 78-70).

C. State Water Project [SWP] - "Water Entitlement" belongs to the taxpayers who are harmed by the Decision

High Desert Power Project (HDPP), is proposing to use a portion of the SWP water entitlements currently allocated to the Mojave Water Agency [MWA], and thus are owned by all of the taxpayers and water producers of the MWA territory. The power project and its underlying property, known as George Air Force Base, and previously owned by the United Sates Government has never paid any taxes into the development of the SWP. By contrast the local MWA taxpayers have paid over $300,000,000 in the support of SWP, which to date has only minimally supplied the area with water. The taxpayers should not be obligated to subsidize the HDPP, when their own water basins are in overdraft.

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[12] CITY OF CARMEL-BY-THE-SEA v. BOARD OF SUPERVISORS (1986) 183 Cal.App.3d 229, 227 Cal.Rptr. 899;

D. The SWP entitlement is subject to a conservation plan to recharge the overdrafted basins by applying a standard of 50% average consumptive use and 50% to recharge

The MWA is guided by a Regional Water Management Plan (RWMP), where a Program EIR was prepared in February of 1994[13] The RWMP never studied the use of water for cooling in a power plant. The RWMP concludes that all of MWA's entitlement is needed for "recharge" of the water basins and further urban development, under the theory that all uses are on average 50% consumptive.

Even with the RWMP, the overdraft has not been curtailed in the six years since the judgment has been effective. In fact, urban users are expanding their production in the Regional aquifer where no natural recharge is available.[14]. The evidence is undisputed that the overdraft in the 1998-1999 water year was greater than 52,000 acre-feet per year and is principally caused by urban development, not agriculture.[15]

The "equitable" nature of the conservation plan (also the physical solution) is currently before this Court. The MWA petition is prompted, at least in part, on the trial court's finding that all producers within the MWA Region have violated the State Constitution Article X Section 2, by their "waste" and "unreasonable use" of water. The trial court finding is at odds

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[13] DECISION: Exhibit 111; RWMP update due 2/99, but no update has even been started.

[14] DECISION: Ex. 120; page 4; ". . . water in the alluvial aquifer does not readily flow large distances into the surrounding regional aquifer."

[15] DECISION: Ex. 174 - Webb Study January 26th 2000; page 4

with the determination that the use of water for agriculture is one of the highest and best uses of water in this state. MWA is requesting this Court to determine why farmers should be included in the physical solution against their will and without regard to their "vested water rights."

E. The State Water Resources Control Board (SWRCB) Resolution 75-58 mandates "studies" of alternative cooling which were not completed

Drawing from Article X Section 2 and the Water Codes, SWRCB Resolution 75-58 discourages the use of "fresh inland water" for power plant cooling. While acknowledging SWRCBR 75-58 as a Law, Ordinance, Regulation, or Standard [LORS] that the Commission must comply with, the Commission did not comply. In fact during the process for HDPP the SWRCB was not notified that HDPP intended to use SWP water for cooling. In pertinent part the Resolution provides: [16]

". . . Studies of availability of inland waters for use in power plant cooling facilities . . . for all major new uses must include an analysis of the impact of such use . . . studies associated with power plants should include an analysis of the cost and water use associated with the use of alternative cooling facilities employing dry, or wet/dry modes of operation."

" . . .Section 25601(d) of the Warren-Alquist Energy Resources Conservation and Development Act directs the Commission to study, "expanded use of wastewater as cooling water and other advances in power-plant cooling" and Section 462 of the Waste Water Reuse Law directs the Department of Water Resources to "…conduct studies and investigations

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[16] DECISION - Ex. 124 - SWRCBR 75-58

on the availability and quality of waste water and uses of reclaimed waste water for beneficial purposes including, but not limited to… cooling for thermal electric powerplants."

No studies were conducted as required for HDPP.

III. BACKGROUND

More than 600 power projects have been certified over the past 30 years - 24 are currently in the approval process. The use of water for power plant cooling in all certified plants is expected to be over 1,000,000 acre-feet per year. The impacts of between 3,000 to 4,000 acre-feet [in typical power plants] of water for 100% consumptive use, decreases the availability of water for domestic and agricultural purposes and urban development.

The plan for MWA is to manage both local and imported water supplies to eliminate overdraft conditions in the underlying ground water basins."[17]. The cumulative effects on regional populations and the statewide impacts on the state as a whole are staggering. By following the Constitution, the Warren Alquist Act and the SWRCBR75-58's direction that the use of fresh inland water for cooling is the least-favored use, the Commission would "conserve" - hundreds of thousands of acre-feet of water for California's households per year.

The High Desert Power Project (97 AFC 1) was the first Application for Certification (AFC) to be filed for a new merchant power plant in the deregulated energy market. The project proposes to provide up to 720

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[17] DECISION: Ex. 111 - RWMP June 29, 1993

megawatts of power from two gas turbine generators and its associated or appurtenant facilities. The power will be sold into the merchant system [California Power Exchange], where the power will be primarily used in the Los Angeles area. The cost of the HDPP is $360 million dollars, and will create 27 permanent jobs for the region.

After almost two years of review, HDPP could not be certified in part because: "Applicant has failed to persuasively demonstrate that a firm source of water will be available to supply the needs of the project."[18]

Nothing has changed to demonstrate that there is a "firm source of water". What has changed is the record makes it appear there's a water supply. Thus, on paper, there is a signed Aquifer Storage and Recovery Agreement. However, the "agreement" only becomes operative when the Commission provides a CEQA Equivalent Document. Also, the "agreement" requires four additional agreements, none of which exist even in "Draft Form" or became a part of the record. Even if all of those agreements were signed as proposed, they would not guarantee a "firm source of water". The proposed source at best is interruptible and the contract must be renewed annually.

The "appurtenant [water] facility" includes; the construction of a 24" water line with a capacity of 16,000 acre-feet of water annually; a water treatment facility that initially can treat 8,000 acre-feet of water annually; the construction of over 6 miles of 18 inch pipelines and 7 wells for water injection into an overdrafted "regional aquifer", where the water is to be

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[18] Presiding Members Proposed Decision (PMPD) December 1999.

stored for return to the HDPP and other uses by the VVWD. HDPP was certified without a CEQA analysis covering growth-inducing and cumulative impacts for these appurtenant facilities.

The HDPP requires that it be "cooled". There are several methods of cooling power plants. HDPP as certified will use a portion of the limited SWP entitlement belonging to the taxpayers of the MWA. This in contrast to the type of cooling the Commission "required" in the Sutter Power Plant.

> "In a letter to the Energy Commission dated September 11, 1998, Calpine [the project owner] proposed using a 100 percent dry cooling design which will reduce groundwater use to an annual average of 140 gallons per minute and will result in zero discharge of effluent from the facility. The cooling tower will be replaced by air cooled condensers that will not emit a steam plume and will eliminate biological impacts associated with wastewater discharge and cooling tower drift. (Ex. 2, p. 439; 11/2/98 RT 123.) The Commission **has required this dry cooling technology to be used**." [19]

The Commission certified the HDPP over the objection of this Petitioning/Intervening Party and many public commentors in the siting case [including present and past MWA Directors]. Certification allows the HDPP to use 4,000 acre-feet per year of SWP entitlement water for 100% consumptive use in its evaporative cooling towers, without providing an equivalent "mitigation" for curing the Mojave overdraft that all other pro-

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[19] 97 AFC 2 - Sutter Power Project; page 131; Petitioner requests the Court Take Judicial Notice of this Certified Proceeding. See also: pages 11, 27, 40, 99, 116, 174-178, 239, 269 and 270.

ducers are required to implement, i.e., providing "replacement water" on the basis of 50% average consumptive use".

Petitioner frequently stated in workshops, pleadings and formal hearings that the Commission was required to comply with the Warren-Alquist Act and CEQA to "study" cumulative and growth inducing impacts, as confirmed by Commission staff; "Staff agrees with Mr. Ledford that certain aspects of the Agreement could create growth inducing impacts. Staff notes that all of the project's water related facilities are oversized."[20] However staff failed to reach mandatory findings of significance. Petitioner continues to state that required studies have not been performed and the Commission's legal staff (acting as an independent party) agreed "studies"[21] mandated by CEQA were not in evidence. The Commission's position, however, is that the issues were "considered". The Commission believes CEQA's requirement to study cumulative and growth-inducing impacts is satisfied if there is "consideration" of the issue; and that testimony rises to the level of a "study". It does not.

Thus, the Commission's Decision will allow HDPP to construct pipelines, wells and additional water treatment facilities that will be used

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[20] CEC Staff Testimony February 11, 2000 page 3

[21] Staff Comments on the Revised Presiding Members Proposed Decision page 2, dated April 13th 2000; "The RPMPD Is Incorrect in Stating that All Impacts, Including Growth-Inducing Impacts Associated with the Importation of SWP Water, Have Been Analyzed in Pre-existing Environmental Documents . . . staff finds nothing in these documents that this Commission could rely upon to address growth-inducing impacts potentially caused by the HDPP."

for projects not considered by the Commission, as the Mayor of the City of Victorville so clearly stated; ". . . create a water treatment facility that will ultimately become available to the general public for use as we build and grow at George Air Force Base and beyond."[22] How? As the representatives of VVWD and the MWA testified; " MR. HILL: "My agency's [VVWD] will serve letter . . . has to meet the CEQA requirement before we can issue a will serve letter"; and Mr. Norm Cauoette; "And one of the reasons for that is our [MWA] ordinance requires a CEQA analysis." [23]

Thus, by relying on the DECISION as the "functional equivalent" of CEQA to enter into agreements to supply water for the "cumulative" projects the evidence clearly demonstrated was the intent of two of the agencies that must provide "future agreements" to use the DECISION as a CEQA Equivalent Document.

IV. LEGAL DISCUSSION

A. Article I, Section 7, of the California Constitution protects against discrimination or differentiation of treatment between water users in the Mojave Water Basins.

All water users and producers in the MWA territory are required to conserve water and to limit consumptive use of water to an average of 50%. The Commission's certification allows HDPP to 100% consumptively use water in the evaporative cooling towers of a new power plant and requires no water conservation. To grant preferential treatment to HDPP violates -

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[22] RT October 7, 1999: Mayor Terry Caldwell: page[s] 166-172

[23] RT October 7, 1999: page 313 and 333

"equal protection" of laws guaranteed to citizens under the Constitution.[24]

The threshold question on this challenge under the equal protection clause of Article I, Section 7, of the California Constitution (or the Fourteenth Amendment of the United States Constitution) is basic and conventional. First, examine if there is "discrimination" or "differentiation of treatment" between classes or individuals and then determine if there is a conceivable legitimate state purpose for the differentiation.

In this case the preferential treatment of HDPP is discriminatory. And, there is no legitimate state purpose to discriminate between the MWA-water producers, subject to a court Judgment and physical solution and a new water user. Or stated another way, there is obvious discrimination when all water users must conserve water except one.

By contrast, an even-handed, non-discriminatory "consumptive-use-mitigation" condition would require HDPP to purchase 8,000 acre-feet of water - 4,000 acre-feet for its consumptive use and 4,000 acre feet to recharge the over drafted water basin. The Decision should comply with the Judgement; (Ibid. FN 1) creating a level playing field and provide equal protection to all water producers. Unfortunately, the Commission Decision is unconstitutional and violates basic equal protection tenants. The Court must reject unfair discrimination.

B. Article X Section 2 of our Constitution mandates the reasonable and beneficial use of water and that the waste or unreasonable method of use of water be prevented.

Petitioner asserts that the use of water for power plant cooling in the

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[24] D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1

arid and over drafted region of the MWA is "unreasonable" and "wasteful" and there is a feasible and environmentally preferred alternative method of cooling the power plant. The state Constitution requires not only that water use be "reasonable" but that the state's water resources be put to beneficial use to the fullest extent of which they are capable (Cal. Const., art. X, §2). The fact that a water use may be "beneficial," does not mean such use is necessarily "reasonable" as contemplated by the constitutional mandate. [25]

The Attorney General puts it in forceful language, "This resolution [SWRCBR 75-58] demonstrates a strong state policy against squandering precious fresh inland water for power plant cooling towers. . . . [W]hen clean, high quality water is consumed by a disfavored use, such as cooling towers, this is nothing but reckless waste". [26]

It is difficult to imagine a more proprietary interest than the consumption of water and its removal from its mandated destination to recharge the MRB. Water for hydroelectric purposes may be diverted but ultimately is returned to the water system; it is usufructuary in nature and non-consumptive. (See Federal Power Com. v. Niagara Mohawk P. Corp. (1954)) In contrast, water used for consumptive purposes permanently reduces the amount of water that would otherwise be available for recharge.

The Commission's Decision must answer the Constitution when the control, appropriation, use or distribution of water used 100% consump-

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[25] Imperial Irrigation Dist. v State Wat. Resources Control Bd. (1990,4th Dist) 225 Cal App 3d 548, 275 Cal Rptr 250.

[26] Petition for Reconsideration; Ex. "A" Letter from California Attorney General - Dated May 22, 2000

tively for power plant cooling. The Decision must be based on Findings that the "use" is/is not (1) a waste or unreasonable; (2) beneficial; (3) a reasonable method of use; and (4) minimally essential. The Decision does not address the Constitution and does not make the required Findings.

C. The Commission, as "lead agency" must provide a functional equivalent, CEQA-compliant Decision like an EIR

The following "Points" establish PRC and CEQA requirements and illustrate the HDPP's non-compliance. Necessary modifications, mitigation measures, conditions, or other specific provisions relating to the manner in which the proposed facilities are to be designed, sited, and operated in order to: (1) Protect environmental quality; (2) Assure safe and reliable operation of the facility; and (3) Comply with applicable standards, ordinances, regulations or laws. **(**Title 20 California Code of Regulations (CCR)§1752 (c))

Petitioner's position is that critical project-impact studies were not performed by the Commission.

1. CEQA requires the Lead Agency to study potentially significant adverse environmental effects, including those that are cumulative .

"CEQA requires an analysis of all significant effects of a proposed project. (PRC § 21100)"[27] Thus, the Commission must evaluate all significant direct, indirect, and cumulative impacts the project might cause or to which

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[27] Commission Staff Brief; March 7, 2000 - BRIEF OF COMMISSION STAFF ON THE COMMISSION'S RESPONSIBILITY TO ANALYZE THE GROWTH-INDUCING IMPACTS OF THE WATER SUPPLY PLAN FOR THE HDPP PROJECT

it might contribute"[28], including the potential to bring development and people into the area affected, or foster economic or population growth, or remove obstacles to population growth. (PRC § 21100(b)(5), Title 14 CCR § 15126)… the effects of which must be evaluated prior to approval by the Lead Agency. "Certified regulatory programs must undertake a meaningful assessment of a project's cumulative environmental impacts."[29] And, " Documents from a certified regulatory program must still meet CEQA's central requirements including the need to analyze feasible alternatives and mitigation measures, to consider potential cumulative impacts and to allow for meaningful public review." (PRC § 21080.5, CEQA Guidelines §§ 15250-15253)

CEQA and the courts also provide guidelines (Title 14 CCR, § 15000 et seq.) to direct a lead agency on the scope of evaluation of growth-inducing and cumulative impacts. Citing the City of Antioch v. City Council of the City of Pittsburg (1986) 187 Cal.App.3d 1325, 232 Cal.Rptr. 507, the Commission's legal staff agreed that an EIR must assume the general form, location and amount of development that now seems reasonable to anticipate from a project. The level of detail included in the analysis is dependent upon the type of project…. (Title 14 CCR § 15126) Moreover, a project

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[28] Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 764 P.2d 278; 253 Cal. Rptr. 426; " . . because the report did not address cumulative future effects, it did not adequately describe the "project" within the meaning of the California Environmental Quality Act."

[29] Environmental Protection Center v. Johnson (1st Dist. 1985) 170 Cal.App.3d 604, 624-625 [216 Cal.Rptr. 502]

cannot be considered in isolation from the development it presages…. because the construction project provided a catalyst for further development in the area, the lead agency must evaluate the effects of such future development. In HDPP, as in City of Antioch, the fact that future development might take several forms does not excuse environmental review; the Commission is required to analyze the forms and extent of future development that now reasonably seem most likely to result from the HDPP. (Ibid. FN 27)

Yet in HDPP, and all other siting cases, the Commission as a body studies the power plant in "isolation", ignoring the "cumulative impacts" of other projects around it.

2. The HDPP Water Supply Plan allows other agencies to use the facilities creating significant, unstudied growth-inducing impacts

The record shows that all of HDPP's water related facilities are oversized. (Ex. 146a, p. 3) In addition, the aquifer storage and recovery agreement entered into between HDPP and VVWD allows VVWD use of the HDPP water facilities. (Ex. 145, §§ 8.3, 15), in this case, "[T]he project has possible environmental effects, which are individually limited but cumulatively considerable". (PRC § 25523(d)(1) and Title 14 CCR § 15065. (c)) Commission staff concluded that VVWD's use of the water facilities was clearly growth inducing. Supporting staff's conclusion was the fact that use of HDPP's facilities makes an additional source of water available to VVWD, in an area with an extremely serious water shortage. (Ibid. FN 27)

The uncontroverted testimony before the Commission was that if VVWD's use of HDPP water facilities provides an additional 4,000 acre-

feet per year of water (which staff considered to be a reasonable assumption, this additional water would be sufficient to supply 12,000 new residents, or 25% of the current population. (RT 2/18/00, p. 205; Buell) Increases in population could likely lead to; increased air emissions, wastewater and waste production, adverse impacts on water, traffic, and new demands on community services.

The Commission circumvents a binding obligation on the part of the Victor Valley Economic Development Authority [VVEDA] to comply with CEQA, which requires VVEDA, with respect to its redevelopment plans for GAFB; " . . .shall evaluate each individual project to be undertaken in connection with the implementation of the 1993 Redevelopment Plan and which may in **any way impact upon water resources**, directly or indirectly, for its growth inducing potential and its impact on local water resources. VVEDA shall not approve any project unless available water resources for the project are adequate to meet projected demand of the project."[30]

CEQA requires that the Commission analyze cumulative and growth-inducing impacts if there is substantial evidence sufficient to support a fair argument that the project may have a significant cumulative or growth-inducing effect." (Stanislaus Audubon Society, Inc. v. County of Stanislaus (1995) 33 Cal.App.4 th 144, 39 Cal.Rptr.2d 54) One reasonably foreseeable outcome of particular concern is that the increased availability

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[30] DECISION: Ex. 127 Agreement for Cooperation between Mojave Water Agency and VVEDA Dated December 22, 1993. Ref. Ex. 136 & 137.

of SWP water supports additional growth. But, when SWP water is not available (as in extended times of drought), the additional growth must be supported through additional use of groundwater. Additional growth causes typical growth-related impacts (increased traffic and demand for services), and additional deleterious effects on the Mojave River habitat as well. (Ibid. FN 27)

In the March 7, 2000 brief the Commission's legal staff concludes, " . . .in order to comply with the requirements of CEQA, staff strongly urges the HDPP Committee to carefully consider the direct, indirect, and growth-inducing impacts associated with VVWD's use of the HDPP water facilities". The Committee did not, it received what it concluded was evidence by way of testimony and imposed a "condition" to require a CEQA analysis in the future. This is contrary to the legislative intent of CEQA, which requires that agencies, ". . . shall evaluate the cumulative impacts, growth inducing impacts, and irreversible significant effects on the environment . . ." (CEQA Section 21156)

3. There are no exceptions or exemptions to the requirement that significant adverse cumulative and growth-inducing impacts be mitigated including general-plan conformity

CEQA cannot be interpreted to relieve a lead agency of the responsibility to consider cumulative and growth-inducing impacts merely because a project is consistent with a general plan. (Ibid. FN 27)

State law requires each county and city to prepare a general plan for physical development within its boundaries and for development of any land outside its boundaries which bears relation to planning. (Gov. Code, § 65300) In addition, all development actions taken by the local government

must be consistent with the General Plan. (Gov. Code, § 65860, Neighborhood Action Group for the Fifth District v. County of Calaveras (1984) 156 Cal.App.3d 1176, 203 Cal.Rptr. 401)

The HDPP Decision does not mitigate the cumulative and growth inducing impacts associated with the use of the appurtenant water facilities, therefore it does not comply with CEQA.

4. A Lead Agency's cumulative and growth-inducing impact analysis may reference local planning documents only if those documents discuss the proposed project.

In the case at hand, the HDPP Decision looks to the City of Victorville General Plan to evaluate the cumulative and growth-inducing impacts associated with VVWD's use of the HDPP. There is however, no reference in the City of Victorville's General Plan to the HDPP. Neither the 1994 Regional Water Management plan, prepared by the MWA (portions of which are included in Ex. 110), nor the 1995 Water Master Plan prepared by VVWD (which is not in the record), mention the HDPP (Ibid. FN 31).

In HDPP there are no environmental documents in the record discussing the 100% consumptive use of water in cooling towers. The Guidelines require (and the Decision does not have) an adequate cumulative impacts analysis including a list of the projects producing related or cumulative impacts, a summary of the expected environmental impacts from those projects and a reasonable analysis of the cumulative impacts of the relevant projects. (Guidelines, § 15130.)

"Absent some data indicating the volume of groundwater used by all such projects, it is impossible to evaluate whether the impacts associated with their use of groundwater are significant and whether such impacts will

indeed be mitigated by the water conservation efforts upon which the EIR relies". [Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, page 730]

As a result, the Commission must conduct its own analysis, or in the alternative require the MWA and/or VVWD to comply with CEQA.

5. Failure to comply with CEQA's requirement that public comments be considered is Prejudicial Abuse of Discretion.

The Commission refused to consider substantial, relevant evidence (more than 20 exhibits)[31] supporting petitioner's position that a study of the cumulative and growth inducing impacts of the water supply and "use" must be completed to comply with the California Constitution. A lead agency may disagree with the public, but failing to consider the comment/issue is abuse of discretion [32].

Petitioner frequently and continuously raised the questions of cumulative and growth inducing impacts as a public participant. For more than two years the issues were ignored, even the "Commission Staff agreed that a more comprehensive analysis could shed additional light on this issue; however, no party had conducted such an analysis . . ." (Ibid. FN 27) demonstrating a callous disregard for the public process and precluding

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[31] DECISION: - Exhibits 147 through 167 and portions of Exhibit 168, Denied to be placed in evidence.

[32] County of Inyo v. City of Los Angeles (1978) 78 Cal.App.3d 82, 89, fn. 2 [144 Cal.Rptr. 71]) (sub nom. County of Inyo v. Yorty, 32 Cal.App.3d 795 [108 Cal.Rptr. 377]), ". . . held that the proposed increase of extraction was a "project" within the purview of CEQA.

meaningful participation by the public.[33]

As your Third Appellate District found in County of Amador v. El Dorado County Water Agency, (1999) p. 12-14; noncompliance with substantive requirements of CEQA or noncompliance with information disclosure provisions ". . . which precludes relevant information from being presented to the public agency . . . may constitute prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (§21005, subd. (a).) In other words, when an agency fails to proceed as required by CEQA, harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decision making and informed public participation. Case law is clear that, in such cases, the error is prejudicial. (Sierra Club v. State Bd. of Forestry (1994) 7 Cal.4th 1215, 1236-1237; Fall River Wild Trout Foundation v. County of Shasta (1999) 70 Cal.App.4th 482, 491-493; Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 712; East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist. (1989) 210 Cal.App.3d 155, 174 (East Peninsula); Rural Landowners Assn. v. City Council (1983) 143 Cal.App.3d 1013, 1021-1023.)

D. PRC § 21080 mandates that an activity will not be approved or adopted . . . if there are feasible alternatives.

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[33] An EIR is an "environmental 'alarm bell' Santiago County Water Dist. v. County of Orange (1981) 118 Cal.App.3d 818, 822 [173 Cal.Rptr. 602].

The Commission Decision fails to disclose a detailed evaluation of alternatives to the use of fresh inland water. There was no study covering the use of "vested water rights", reclaiming - treatment and reuse of contaminated groundwater beneath the site or "dry cooling." Feasible alternatives to the use of fresh inland water exist thus the HDPP Decision does not comply with the requirements of the Commission's certified siting program PRC § 21080.5

> "(A) Require that an activity will not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment."

In HDPP the Commission fails to "clean up" existing soil and groundwater contamination and only provides a condition that; ". . .the project owner shall provide access . . . for all efforts to characterize and remediate all contaminated soil and/or groundwater".[34] The condition fails to respond to the comments of California Regional Quality Control Board - Lahontan Region [CRWQCBLR], ". . . staff is very concerned with the (sic) Commission's proposal to construct a power plant in the vicinity of an ongoing ground water contamination investigation . . .project may impede investigation and remediation efforts . . ."[35]

E. **The Water Codes prohibit the waste, unreasonable use and unreasonable "Method of Use" of water.**

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[34] DECISION: page: 229

The water codes make it clear that the unreasonable use of water, the waste of water or the unreasonable method of use of water are to be prevented.

F. **SWRCBR 75-58 Mandates that the use of water for power plant cooling be discouraged.**

As has been previously discussed the SWRCB has resolutions that govern the use of water in power plants and have been ignored in HDPP. In addition the Commission is mandated under the Warren Alquist Act Section 25008; ". . .to promote all feasible means of energy and water conservation and all feasible uses of alternative energy and water supply sources." And; § 25602. "The commission shall carry out technical assessment studies . . .to be informed on future energy options and their impacts, including, . . .(d) Expanded use of wastewater as cooling water and other advances in powerplant cooling".

G. **DECISION does not comply with MWA Judgment**

Clearly no one knows what this Court's determination will be in the MWA case. At this point, however, the Judgment (physical solution) is "the law of the land." The Commission did not comply with the MWA Judgment. Thus, the terms of the Judgment (Ibid. FN 1) are not being applied to all producers within the MWA jurisdiction.

H. The Commission's obligation is to provide reliable energy supplies to the citizens of California

The Commission's obligation is to certify "Reliable" power plants.

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[35] Letter from CRWQCBLR to the Commission - Dated July 9, 1999

The Commission acknowledges that without a reliable water supply the power plant will not be reliable. It was made very clear by Hearing Officer Valkosky; "Okay, so again, just to relate it to this particular project, the City of Victorville, on behalf of the applicant, will be coming back every year, and it's pretty much take your chances depending on the availability of water?" Acting MWA Manager Mr. Cauoette: "That's correct" [36]

Since the project's water supply plan relies on the "use" of SWP Water destined to supply and recharge the MRB and on several future agreements that are not in existence it is impossible, for the Commission to be sure this project is reliable. [37] To issue a certificate to a project without a reliable supply of water clearly violates the Warren Alquist mandate directing ". . . the Commission to study, . . . other advances in powerplant cooling . . ." to provide reliable power supplies. [38]

The staff's compelling testimony on "reliability" is in a table of "IMPACTS NOT YET EVALUATED". The table, part of staff's final testimony states, there is "Significant probability of the project failing due to unavailability of SWP water. "[39]

The Fifth District Court of Appeal found in Kings County Farm Bu-

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[36] Hearing Transcript October 7th 1999, page 336 lines 8 - 14

[37] DECISION - Finding of Fact Number 8 on Reliability page 77: "A reliable supply of water is necessary . . . to operate reliably".

[38] Section 25601(d) of the Warren-Alquist Energy Resources Conservation and Development Act

[39] DECISION: - Ex. 146A page[s] 3 & 4; RT February 18, 2000 page 189 - 216

reau v. City of Hanford, that " . . . the failure to evaluate whether the agreement was feasible and to what extent water would be available for purchase was fatal to a meaningful evaluation . . .".

Rick Buell for CEC: " . . . we were made aware of potential issues by Mr. Ledford regarding growth-inducing impacts. At that time we realized that we had failed to consider . . . use of wells . . . use of the water treatment facility. . . [T]he potential . . . to operate the wells for more than 30 years. ".

". . .[T]hat that was the primary reason I would see the project failing, is that there would be an unavailability of water."

". . .I can only repeat my answer again, that we have not studied the implications of VVWD's access to the treated water . . .".

Therefore, since there is a "significant probability of the project failing due to unavailability of SWP water", HDPP as currently certified is not a "Reliable" power supply.

V. CONCLUSION

In conclusion, it is important to the citizens of this state to have a clear understanding of the meaning of Article X Section 2 of the California Constitution and how that provision provides for equal protection to all citizens. Since evaporative cooling consumes 100% of the water with no secondary use, evaporative cooling should be determined to be unreasonable and wasteful.

There is clear, concise and convincing evidence that VVWD's use of HDPP water facilities will cause cumulative and growth-inducing impacts that have not been "studied".

Petitioner requests this Court issue a Peremptory Writ of Mandate or other appropriate Order, to Stay any further processing or development of the HDPP until the issues that have been raised by Petitioner have been heard and resolved by this Court.

It is important to all of the water producers who have rights to the natural water supplies of the Mojave River and the SWP water destined to supply and recharge the basins, to know that all new urban development that will use water will be required to provide at least the same "mitigation" as is required under the MWA Physical Solution i.e. average 50% consumption.

The Court must require that the Commission produce traditional EIRs for the underlying appurtenant projects such as water supply and that neither the Commission nor any other agency shall use the DECISION as the "Functional Equivalent" of CEQA.

This determination is necessary to protect the public's legal right to meaningfully participate in the siting process to ensure safe, reliable and environmentally sensitive energy development in California.

Respectfully submitted,

Dated: July 10, 2000

/s/ signed
Filed July 12th 2000

_____

Gary A. Ledford
Petitioner/Appellant
Taxpayer - Party in Interest

EXHIBIT "A"

ORDER DENYING

PETITION FOR

RECONSIDERATION

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